Supreme Court, U.S.
FILED

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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

RACHAEL V. SANTOS,

Petitioner,

vs.

MARVIN T. RUNYON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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69 pp

QUESTIONS PRESENTED

1. Did the Ninth Circuit Court of Appeals misapprehend and misapply the proper clearly erroneous legal standards in reviewing the U.S. District Court Findings of Fact and Conclusions of Law judgment, that were fatally inconsistent, illogical, and clearly erroneous and both Courts confused material facts and disregarded a classical point of law, namely, the plaintiff's burden of proof of defendant's (employer) motive in a Title VII retaliation case, especially when the allegation of insubordination was concocted by both Godinez and Montoya **after** they removed petitioner from her job?

2. Can the U.S. District Court's, Findings of Fact and Conclusions of Law, that were found to be valid in this case at bar, listed in: Appendix E, Facts 20, 23 and Key 5, 7, and 8 (a)(b)(c),and proved a prima facie case of reprisal in this Title VII discrimination case, then be reversed by the U.S. District Court , on the *same exact findings of fact and preponderance of evidence*, and contradict it's own findings listed in: Appendix E, Law, 12, 13, 14, that denied Plaintiff her job restoration, when she was clearly the most qualified applicant and when in fact, the Court found that the employer lied, was inconsistent and found unworthy of belief and it's retaliatory motives were pretext and sham?

3. Can this Court restore the 20 year old *Mc Donald Douglas v. Green*, three-step process framework and the classic *Burdine*, legal standard, established by this court and used by all the Federal Courts to resolve claims of intentional discrimination in Title VII cases, that this Court recently over turned in *St. Mary's v. Hicks*, and re-examine this issue again, as said decision is contrary to the basic principals of Title VII and the Civil Justice System, to allow employers to lie and place onerous requirements on victims of intentional discrimination?

PARTIES TO THE PROCEEDINGS

Petitioner, Rachael V. Santos, In Pro Se, is the only party seeking review of the Ninth Circuit Appeals Court orders and the U.S. District Court, Findings of Fact and Conclusions of Law Judgment. The caption of this Petition for Writ of Certiorari reflects all parties to the proceedings.

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Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner Rachael V. Santos, in Pro Se, respectfully prays that a Writ of Certiorari be issued to review the District Court's Findings of Fact and Conclusions of Law, Judgment filed on December 9, 1991 and the Unites States Court of Appeals for the Ninth Circuit Affirmed Judgment, non published order, filed on September 13, 1993 and the Ninth Circuit Order, denying and rejecting, plaintiff's Petition for Rehearing and Suggestion for Rehearing en Banc.

Said order was filed on November 1, 1993.

OPINIONS BELOW

Plaintiff, prevailed on two of the three issues that were before the Appeals Court. The U.S. Attorney frivolously argued, the issue of plaintiff's appeal timeliness. The Appeals court ruled that Plaintiff was timely and that the court had jurisdiction over this appeal. The next frivolous argument made, concerned the notice of appeal , the appeal court found that the technical defect of plaintiffs name not written in on one line in the appeal notice form was an example of "imperfect but substantial compliance with a technical requirement". On the third, main Title VII claim issue, the appeals court ruled that they found no basis in the record for concluding the District Court's findings were clearly erroneous. and affirmed the District Court. Those opinions are attached in Appendix A,B,C.

The U.S. District Court dismissed the Postal Service's motion to dismiss and the case proceeded to trial. The court ruled in favor of petitioner on her first claim of retaliation in being terminated from her temporary promotion position as Women's Program Coordinator, awarding her costs and attorney fees and back pay with interest at the legal rate, amounting to the difference between her level -15 pay and level-17 pay, she should have received from October, 1982

to October, 1984, after her two year promotion position was terminated. The Court ruled against petitioner on her second claim of retaliation when she was not selected for the permanent position of Women's Coordinator in 1984.AER 16,17, Appendix D, E.

JURISDICTION

Petitioner was the Plaintiff in this case in the U.S. District Court Central District, who had the proper jurisdiction, pursuant to the remedying provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e- et seq. and pursuant to Title 28, U.S.C. §§1331(a) and 1343(4).and Title I, Civil Rights Act of 1991,§ 102.(a)(1). Petitioner was the Plaintiff/Appellant in the Ninth Circuit Court of Appeals. The jurisdiction of the Court was invoked pursuant to 28 U.S.C.§1291 and Rules 1,3, and 4 of the Federal Rules of Appellate Procedure, governing appeals by right from the District Court to the Court of Appeals. A timely notice of appeal was filed with the Court of Appeals and the case was argued and submitted on July 12, 1993, the court issued a denial memorandum, non published judgment that was filed on September 13, 1993. Petitioner timely filed her petition for Rehearing and Suggestion for Rehearing En Banc, on September 27, 1993. On November 1, 1993, the Ninth Circuit Court handed down it's response

and order denying Petition for Rehearing and rejecting Suggestion for Rehearing En Banc (attached herein as Appendix A). As per Supreme Court Rule 13.4, this Writ of Certiori petition is timely filed with the U.S. Supreme Court clerk by U.S. Mail and postmarked within the ninety days of the last denial order made by the United States Court of Appeals for the Ninth Circuit on November 1, 1993. Petitioner, requests this Court to grant review on Writ of Certiorari, on the legal questions presented, based on Supreme Court Rule 10.1(a):

> When a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a State Court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

STATUE INVOLVED

Title VII, Civil Rights Act of 1964, as amended, 42 U.S. Code Sections 2000, et seq. 29 C.F.R.§ 1613.261: *Provides that it is unlawful to discriminate against a person*

because he or she filed a charge of discrimination or because of any opposition to an unlawful employment practice.

STATEMENT OF THE CASE

This is a Title VII reprisal employment discrimination case, that arose due to the unlawful discrimination acts of intentional retaliation committed by respondent, employer (agency) United States Postal Service, against petitioner, Rachael V. Santos, for promoting equal employment opportunity in conjunction with her duties as Women's Program Coordinator, a protected activity under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq.[AER 22] Petitioner alleged two major violations of her rights; *first,* when she was unlawfully terminated from her two year temporary promotion position as Women's Program Coordinator at the Sequoia District, due to the Postal Service's reaction to purportedly controversial remarks made by feminist Gloria Steinem at a employee seminar arranged by petitioner. The U.S. District Court found that a prima facie case had been proven in this case and granted relief to petitioner. This issue was not appealed by the Government and was not an issue on appeal, nor is this issue before this court, only the second, issue, is on review by this Court concerning the permanent

promotion position of Women's Program Coordinator, level 17, when petitioner was not selected on July 16, 1984. Petitioner was the most highly qualified candidate and the person selected was a level 5 clerk with less than five years of postal service and a high school drop out. The agency violated it's own postal regulations in this promotion case. AER 23-25,126

The background and facts in this case are rather succinctly set for in the U.S. District Court Statement of Facts in Appendix E.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

The Ninth Circuit affirmed order made in this case on 9-13-93, is simply wrong because the U.S District Court record of evidence does in fact show and prove that both Godinez and Montoya lied, concerning the allegation of insubordination and in fact the District Court's own Findings of Fact,No. 7, page 8, AER 13, Appendix E, states that it was Godinez's July 20, 1984 affidavit that alleged that plaintiff failed to perform the functions of the position in an acceptable manner is contradicted by the evidence, wherein plaintiff received high praise(by Godinez and Montoya) for implementing the women's seminar for defendant. The allegation that plaintiff disregarded authority or was

insubordinate because she failed to give her supervisor (Montoya) a financial accounting, of the seminar in a timely manner were made after plaintiff was terminated from the position. Therefore, the Court found that this reason was not a legitimate nondiscriminatory reason for Plaintiff's termination as indicated by Godinez's January 25, 1985 affidavit which repudiated his July 20, 1984 affidavit. Findings of Fact No. 8, AER 14, Appendix E, found pretext for reprisal: (a) The inconsistency in testimony between Godinez and Montoya makes defendant's reasons unworthy of belief; (b) Criticism against plaintiff by the affidavits of Godinez and Montoya were made after plaintiff's position was terminated indicating it was more likely that discriminatory reasons motivated defendant; and key fact (c), paragraph two, AER 14, lines 24-26, and Appendix E. "Accordingly , the Court finds that plaintiff has shown by a preponderance of the evidence that defendant retaliated against plaintiff in violation of Title VII when defendant terminated plaintiff's temporary promotion to Women's Coordinator in September 1982."

These same exact facts are then contradicted by the court in Findings of Fact number 12, " Prior to 1984, the plaintiff filed an EEO complaint of which Mr. Godinez was aware. Mr. Godinez had been named as one of the alleged discriminating officials. Mr. Godinez credibly testified that his reason for not selecting the plaintiff for Women's

Coordinator in July 1984 were her prior insubordination to Mr. Montoya, and his belief that such insubordinate behavior was unacceptable. Mr. Godinez considered the plaintiff was not a "team player" and could not be trusted in the position based on her prior behavior regarding the files." This is where the District court clearly erred and confused the already accepted facts. There never was any insubordination commited by plaintiff, nor was plaintiff ever charged with an adverse action of insubordination, nor was she ever informed of such allegation , what is important for this court to see is the fact ,that the allegations are all made AFTER plaintiff filed her complaint of discrimination. The incident characterized by Mr. Godinez as insubordination, both at trial, RT 263:16-20. and in his affidavit of July 20, 1984, ER 69, Mr. Montoya, described the finance issue as, insignificant .RT 195:19-21. Mr. Montoya also stated in his affidavit of July 20, 1984, he had many reasons for taking disciplinary action against petitioner, but he did not do so, he indicated that all he wanted was the materials back and to let petitioner go on with her career, also in his affidavit, he stated he never informed petitioner that she could or would ever be disciplined, AER 73 and that as far as he knew, she returned all the records in her possession. AER 74, RT 195 and AER 75,77. Mr. Montoya testified that the financial records were turned in about a week. RT 194: 22-24

There was a stipulation made at the EEOC hearing that, petitioner had properly accounted for and turned over to her successor an interest, Mr. Montoya, that all funds connected with the Steinem seminar that were non- postal funds. AER 138 .

In addition to this, there is also further evidence in the EEOC RT 266 and 267, page 267 states, "Mr. Stark, speaks to Mr. Deapen(agency rep.), If you want to get right down to it, your investigator, and Mr. Montoya and Mr. Godinez, knew to an absolute certainty that their statement was false in saying that she hadn't submitted her report in a timely fashion because they had this in their hot little hand, and you are trying to take advantage of your own misconduct in making that argument of theirs fly."

Generally, stipulations entered into freely and fairly are not to be set aside except to avoid manifest injustice. *Fairway Const, Co. V. AllState Modernization, Inc.*, 495 F.2d 1077 (1974).

Petitioner contends that both courts did not give proper legal credence to said stipulation. This court may reverse findings of fact by a trial court where clearly erroneous. *U.S. v. Gypsum Co.*, 333 U.S. 364 395 (1948). Rule 52(a) of the Rules of Civil Procedure, states, that when a finding of fact by the trial court is "clearly erroneous" when, although there is evidence to support it, the reviewing court

on the entire evidence is left with the definite and firm conviction that a mistake has been committed. In this case the testimony was so conflicting, it's clearly erroneous.

The court record simply does not support the Ninth Circuit Court's conclusion that the trial court considered and rejected only Mr. Montoya's testimony, Appendix C No.(4), that Ms Santos was insubordinate as a basis for removing her from the job. Rather, the trial court primarily relied on Mr. Godinez's testimony on the issue of insubordination, and found it to be sham, as the trial court's Findings of Fact demonstrate, in particular , Conclusions Nos. 7 and 8 (a),(b), and (c),Apendix E.

Both courts further confused the real evidence in the record, Mr. Godinez alleges to have stated that petitioner was not a team player, well this fact just goes out the window because Mr. Godinez, testified before Judge Hatter to the following statement that vindicates this allegation and it places it where it belongs as a pretext and lie. Mr. Foster asks Mr. Godinez the following question, Now in another of your meetings, you accuse Ms. Santos of not being a team player, Is that correct, sir?, Mr. Godinez ,responds, not to my knowledge, counselor. RT 281:14-17

The evidence in the court record clearly controverts all allegations against petitioner, in fact said evidence show that she was a team player, a leader who conducted one of the largest conferences in the history of the agency and inspired

her peers and even after said program petitioner also planned another Affirmative Action and Hispanic Heritage program and received a commendation from MSC Manager Reginal F. Martin and most important for the Court to note is the commendation from the Regional Postmaster Mr. Joseph Careveo, who enjoyed himself in being able to sit-down, relax and discuss postal issues with rank and file personnel. AER 86,55,56 and 142. The key evidence to end this case is AER 82, where both Hector Godinez and Mr. Montoya both commend petitioner for her "teamwork" and as the individual who headed the team responsible for the Districts achievement. A special luncheon was also given to petitioner at Knotts Berry Farm. A quick comparison between AER 89,90,91,92,93, which is petitioners qualifications speaks for itself, to that of AER 94, 95,96,97.

The U.S.District Court primarily relied in its findings of fact on Mr. Godinez's testimony that Ms. Santos was insubordinate, and rejected it. Trial Court decision, Conclusion No.7, AER 14:1-6.Appendix E

The record does not support the Postal Service's argument that it was only Mr. Montoya the trial Court relied on to make its determination that the defendant had retaliated against Ms. Santos when its officials, Messrs. Godinez and Montoya, had removed her from the position of Women's program Coordinator. Both men had concocted the insubordination defense after they removed Ms. Santos from

her job. Petitioner states, "concocted "because the trial court ruled that the defense was sham:

"Criticism against plaintiff by the affidavits of Godinez and Montoya[including the "insubordination accusation'] were made after plaintiff's position was terminated it was more likely that discriminatory reasons motivated defendant;..." Conclusion No. 8(b),AER 14:16-18. Further, Montoya backed off at trial about the incident calling it "insignificant and conceding that petitioner had properly accounted for the funds. The trial court ruled in favor of Ms. Santos on her retaliation claim that both Messrs. Montoya and Godinez removed petitioner from the temporary position of Women's Program Coordinator in retaliation for putting on a Women's program involving Ms. Steinem as a speaker. The Court specifically found in AER, 13-14, Fact No. 7, Appendix E, "Defendant's reason for terminating Plaintiff's position as articulated by Godinez in his July 20, 1984 affidavit that plaintiff failed to perform the functions of the position in an acceptable manner is contradicted by the evidence wherein she received high praise for implementing the Women's seminar for defendant. The allegations that plaintiff disregarded authority or was insubordinate because she failed to give her supervisor a financial accounting of the seminar in a timely manner were made after plaintiff was terminated from the position. Therefore, the Court finds that this reason was not a

legitimate nondiscriminatory reason for plaintiff's termination as indicated by Godinez's January 25, 1985 affidavit which repudiated his July 20, 1984 affidavit." The Court then ruled in petitioners favor on the claim that her removal from the job was retaliation for presenting the Women's Program with Ms. Steinem as a speaker. AER 14. At this point, then, the trial court had adjudicated Mr. Godinez (and Mr. Montoya) to be retaliatory in their state of mind toward Ms. Santos. Yet in ruling on the retaliation for non selection to the position of Women's Program Coordinator, the Court reversed itself and ruled that Mr. Godinez was credible: "...Mr. Godinez credibly testified that his reason for not selecting the plaintiff for the Women's Coordinator in July 1984 were here prior insubordination to Mr. Montoya, and his belief that such insubordinate behavior was unacceptable.." AER 15, Fact No. 12. This makes absolutely no sense. The trial court had just rejected the defense of insubordination made by Mr. Godinez (and Mr. Montoya) for the two men removing her from the job.

Then, in a complete 360 degree turn around, Mr. Godinez's belief of insubordination served as a credible reason for not selecting Ms. Santos for the Women's Program Coordinator job. The trial court rejected Mr. Godinez's (and Mr. Montoya's) claim of insubordination when Mr. Godinez (and Mr. Montoya) removed petitioner from the job, but accepted Mr. Godinez's claim of

insubordination when Mr. Godinez (and Mr. Montoya) refused to put her in the job permanently. The Trial Court was correct in its factual findings, that it was Mr. Godinez who insisted on calling petitioner insubordinate, and the record supports these findings. It is just that the court reversed itself on the burden of proof, finding Mr. Gondinez's belief that petitioner was insubordinate pre textual when it came to removing her from the job, but sincere and credible when it came to keeping her out of the job. The Ninth Circuit accepted the factually-erroneous argument of the Postal Service and its attorney that it was Mr. Montoya who the trial Court relied on with respect to the removal action, and Mr. Godinez, with respect to the non selection action.

At oral augment, Judge Hall stated that she admitted that "there seems to be an inconsistency". Appendix C, No.2 Judge Gibson appeared to be concerned about the relative qualification of Ms. Santos and the selected employee Herrera, and hit the nail right on the head, that the agency indeed had retaliated against petitioner. Appendix C, No.30-36. Judge Kleinfeld stated that it appeared to him that the Circuit Court Judge thought Santos' employers were lying about the temporary position but not about the permanent position, and it appeared that the District Court Judge drew a distinction between Godinez whom he did not believe, and

Montoya whom he did (actually, the Trial Court did not believe Montoya or Godinez on the removal and then believed Godinez on the non selection on the same defenses).The U.S. Attorney devoted a great deal of her argument to the "insubordination" defense as if it were a fact established against petitioner at trial, and was in the Court of Appeals to reverse a finding that she was insubordinate. She also misstated the court record, RT 109:14-25, in fact vindicates petitioner, because she answered, "No, Ma'am not in the manner you have asked me the question."
The Governments witness also finally vindicates petitioner of the allegations made, by the Government itself, in RT 172:24-25 and 173:1-5, "Question, and indeed Ms. Santos did file a timely accounting with respect to the funds, isn't that correct, ma'am? Answer, I can't really answer that because I don't know when that happened, question, in other words, you don't know?, Answer, I was not present, correct.", See Appendix C No.27, completely refutes said statement. In addition, Ms. Engelbrecht did not even know that the funds were non postal, RT 172 and worse she never paid Ms. Steinem the money, RT 171, the money was wrongfully spent, yet no was ever fired for theft and the agency tried to cover up this fact,as further misconduct, they withheld the original EEO exhibits that were presented to the Administrative Judge, Jill Klein, when the recommended finding of discrimination was made on both issues, which

was a complete vindication. The evidence included a video of the seminar, that was viewed and said video vindicates petitioner, because it shows that she indeed did perform her duties and even received an ovation from the audience, petitioner brought this fact to the courts attention in her motion for new trial and said motion was denied on the bases it would prejudice the Government. The agency ordered that there would never be any more major conferences and Godinez did receive repercussions from former Postmaster General Bolger and that was what really happened in this case, and petitioner suffered discrimination as a result of such acts. RT 252:3-8,279:12-20 and EEOC RT 187:8-25,188:1-114,411:20-25, key are RT 122:16-25 and RT 123:1-25.

Judge Kleinfeld, appeared to adopt this argument, commenting that petitioner had held "money hostage" for the things she allegedly wanted for the women's program and other things. The question presented to this Court is whether one characterizes petitioners conduct as "insubordination" or as Judge Kleinfeld did, "holding money hostage", (which was absurd) the trial Court found that the defense based on that conduct by both Mr. Montoya and Godinez for removing petitioner from her job was a sham and then immediately accepted it as a valid defense for not selecting her for the very same job. The directly-contradictory conclusions placed petitioner in a no-win

situation. Petitioner won on the insubordination defense with respect to the temporary job, but lost on the insubordination defense with respect to the permanent job.

The Government did not cross appeal, and therefore this Court of last review must accept as binding that the insubordination defense, like the other defenses, proffered by both Messrs.. Montoya and Godinez were sham and pretext for retaliation. Petitioner did not have to rehash the factual disputes concerning this defense because she won. However, the trial court said that Mr. Godinez was truthful when he said he would not place petitioner in the job permanently because she was insubordinate, which forces petitioner to then prove she was not insubordinate.

The Ninth Circuit affirmed order made in this case is contrary to it's own decisions and it is necessary to secure or maintain uniformity in the case relied on by the Court in it's opinion affirming the trial Courts decision in, *Norris v. City and County of San Francisco,* 900 F,2d 3126, 1329 (9th Cir. 1990). "A Title VII plaintiff may show pretext, either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." The bottom line as pointed out in Norris, 900 F.2d at 1331, "...[I}s whether Norris' rejection, when it occurred, was then actually motivated by illegal discrimination, not whether the City could thereafter

articulate some hypothetical nondiscriminatory reason for its decision,]" The trial Courts conclusion itself that the insubordination defense and other defenses offered by the defendant's witnesses was pretext for removing petitioner from the temporary position provided petitioner the discriminatory reason for not selecting her two years later for the job Messrs. Godinez and Montoya had removed her from and given the previous conclusions of the Court that both Mr. Godinez and Montoya were not credible witnesses and their defense of insubordination was pretexual, and therefore, had retaliated against petitioner two years before by removing her from her two year promotion position. Mr. Godinez's and Mr. Montoya's refusal to select her for a position two years later for the same reasons are as a matter of law, tainted with impermissible retaliation, The Ninth Circuit also pointed out in , *Freightways, Inc. v. Stafford,* 217 F.2d 831, 835 (9th Cir. 1955), "In considering a situation where facts found are in irreconcilable conflict it is the duty of the appellate court to accept those which are most favorable to the appellant." Petitioner won, and then that win was undone by the contradictory finding that Mr. Godinez had become credible in testifying to facts the court had just adjudicated non credible. The Ninth Circuit's affirmed order is in conflict with the 1st Circuit's case in, *Hutchstat v. Wooster Foundation,* 425 F.Supp/ (318 District of Massachusetts, 1976) affirmed by the 1st Circuit, 545

F.2d 222 (1976) in which the prima facie cases established by showing that (1) the Complainant engaged in a protected activity, (2) the employer was aware of it, (3) the employee suffered an adverse action or discipline in some form and, (4) within such period of time that discrimination may be inferred the closer in time, the stronger the inference.

In this case petitioner engaged in protected activity and was removed from her position within a matter of days. In the case of, *Texas Dept. of Community Affairs v. Burdine, 450* U.S. 248, 252,254-56 (1981). The court reaffirmed its previously announced views that the defendant in a Title VII case bears the burden of proving by a preponderance of the evidence the existence of legitimate nondiscriminatory reasons for the employment action and the defendant also must prove by objective evidence that those hired or promoted were better qualified than plaintiff. In *Anderson v. Bessemer City, North Carolina,* 470 U.S. 564,573,575 (1985). When documents or objective evidence may contradict the witness's story; (as Godinez) or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact finder would not credit it. The Ninth Circuit did not do this in this case of clear error and this Court can make remedy. On page 577, of said case, this Court was not concerned with the Fourth Circuits clearly erroneous interpretation of the facts, but whether the District

Court's finding was clearly erroneous. Also in the case of *Mc Allister v. United States,* 348 U.S. 19,20-21 (1954).

Petitioner's last question to the Court on the ruling in St. *Mary's Honor Center v. Hicks,* No. 92-602 (6-25-93), can only be resolved with this Court or by Congress. Petitioner respectfully asks the Court to correct the fatal blow to petitioners who are subjected to losing their case because the agency lied, makes no sense at all. I can only hope to God that my case my be worthy to be picked by this court to correct the error made in said case. Petitioner asks that the *Mc Donnel Douglas Corp. v. Green,* 411 U.S. 792,805 (1973), legal framework be restored to up hold Title VII and offer true "Equal Justice Under Law".

CONCLUSION

For all the foregoing reasons, this Court should issue a Writ of Certiorari to review the clearly erroneous, Affirmed Order and Final Judgment of the United States Court of Appeals for the Ninth Circuit and the clearly erroneous Findings of Fact and Judgment of the U.S. District Court Central District.

DATED: January 28, 1994
Respectfully submitted,

RACHAEL V. SANTOS
Petitioner,

By Rachael V. Santos
RACHAEL V. SANTOS
In Pro Se

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RACHAEL V. SANTOS,

Plaintiff-Appellant,

v.

MARVIN T. RUNYON,
Defendant-Appellee

FILED NOV -1 1993
Cathy A, Catterson,
Clerk U.S. Court

No. 92-55211

D.C. No.
CV-89-6123-TJH

ORDER

Before: GIBSON, * HALL, and KLEINFELD, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing. Judges Hall and Kleinfeld have voted to reject the suggestion for rehearing en banc and Judge Gibson recommends rejection.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Floyd R. Gibson, Senior Circuit Judge, sitting by designation.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RACHAEL V. SANTOS

Plaintiff-Appellant

v.

MARVIN T. RUNYON

Defendant-Appellee.

FIELD
SEPT 13, 1993
Cathy A. Catterson
Clerk, US Court of
Appeals

No. 92-55211
D.C. No. CV-89-
6123-TJH

Memorandum*

Appeal from the United States District Court
For the Central District of California
Terry J. Hatter, United States District Judge, Presiding

Argued and Submitted July 12, 1993
Pasadena, California

Before: GIBSON, HALL, and KLEINFELD, Circuit Judges.

Rachael Santos appeals the district court's order finding that the United States Postal Service did not retaliate against Santos in violation of Title VII of the Civil Rights Act of 1964. We affirm.

I. FACTS

In June 1982, Santos was selected for a temporary promotion not to exceed two years, as the Sequoia District Women's Program Coordinator, a level-17 position with the United States Postal Service. Santos reported to Arthur Montoya, the District Director of Employee and Labor Relations. In the course of her duties, Santos planned and conduced a women's seminar, featuring Gloria Steinem as a speaker, on September 10 and 11, 1982, to provide information to female employees about career development. Approximately one week later Santos was told that officials in Washington were disturbed about the widespread publicity surrounding the seminar. During the week of September 20-24, Santos attended an out-of-town management training seminar and when she returned, another individual, Mary Englebrecht, was performing her duties and occupying her desk. Santos was then told that Englebrecht had been assigned to the position; Santos was returned to her previous position as Supervisor of Mails at the Alhambra Post Office on October 3, 1992. On October 20, Santos filed an administrative discrimination complaint alleging that the termination of her promotion was the result of discrimination in violation of her civil rights under Title Vii of the Civil Rights Act of 1964. Specifically, Santos alleged that she was terminated from her temporary promotional appointment due to the controversial nature of

the equal rights seminar she organized. During this same time period, Arthur Montoya asked Santos to provide the financial records and the postal funds generated by the women's seminar. The parties disagree about the facts surrounding this event, but they do agree that the records were eventually turned over to Montoya.

In May of 1984, a vacancy announcement was advertised for the permanent position of Women's Coordinator. A three-member panel screened the applicants and submitted four names, including Santos', to Hector Godinez, the selecting official. Godinez selected Patricia Herrera for the position, and selection was approved by the Regional Postmaster General. Herrera had occupied the position on a temporary basis prior to her selection.

On October 20, 1989, Santos filed another administrative complaint alleging that she was unlawfully rejected for the permanent position of Women's Coordinator in retaliation for her filing a complaint with the Equal Employment Opportunities Commission(EEOC), in violation of her civil rights under Title VII of the Civil Rights Act of 1964. The district court denied the Postal Service's motion to dismiss on May 16, 1990 and the case proceeded to a bench trail on October 7th, 1991. The court ruled in favor of Santos on her claim that she was terminated from her temporary position as Women's Program Coordinator, and awarded her back pay with interest for the time period of October,

1982 to October, 1984. The court ruled against Santos on her claim of retaliation concerning her 1984 application for the permanent position of Women's Coordinator.

II. DISCUSSION

A. Jurisdiction

1. Timeliness

The Postal Service argues that Santos' appeal "appears untimely" because it was filed 64 days after the entry of final judgment, but it concedes in its brief that a motion under Rule 59 may toll the period. Santos argues that her motion under Rule 59 tolled the period for filing a notice of appeal. See Fed. R. App. P. 4(a)(4); Floyd v. Laws, 929 F.2d 1390, 1400 (9th Cir. 1991)(motion for a new trial tolls the time for filing a notice of appeal under Fed. R. App.P. 4(a)(4)). Santos' motion for a new trial, was denied on February 5, 1992 and she filed a notice of appeal on February 13, 1992, which is within the sixty day time period under Rule 4 (A) (4) (iv). Because Santos filed a notice of appeal within sixty days after the denial of her motion for a new trial, this court has jurisdiction over this appeal.

2. Notice of Appeal

The Postal Service argues this court lacks jurisdiction over Santos' appeal. It contends that because Santos' name was

not listed as the appellant on the notice of appeal, the notice was insufficient to give notice to all plaintiffs as required by Fed.R.App.P.3 (c) and is a Jurisdictional bar to this appeal.[1] Santos contends that although her name is not filled in on the space denoting name of appellant, her name appeared on the cover sheet of the notice, in the left hand corner of the notice, and at the bottom of the document where she signed and dated the notice. Our central inquiry is whether "the opposition and the court" received fair notice of the appeal. See United States v. Musa, 946 F.2d 1297, 1301 (7th Cir. 1991). In this case, although Santos' name did not appear on one blank of the notice, she was identified as the appellant within the notice of appeal, and was the only possible appellant in this case, which was sufficient to give the Postal Service notice of her appeal. The technical defect is immaterial because the body of the notice contains a "precise indication as to which part[y] sought appeal." Baylis v. Marriott Corp., 906 F.2d 874 877 (2nd Cir. 1990). This is an example of "imperfect but substantial compliance with a technical requirement." See Torres v. Oakland Scavenger Co., 487 U.S. 312, 315-16 (1988).

B. Title VII Claim

The plaintiff has the initial burden of proving, by a preponderance of the evidence, a prima facie case of

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[1] Fed. R.App.P.3 (c) provides that "[t]he notice of appeal shall specify the part or parties taking the appeal; . . . An appeal shall not be dismissed for informality of form or title of the notice of appeal." discrimination. Mc Donald Douglas Corp. V. Green. 411 U.S. 792, 802-804 (1973). If the plaintiff meets this burden, the defendant must articulate legitimate non discriminatory reasons for its action. Id. Finally, if the defendant meets this burden, the plaintiff must prove that the defendant's reasons are a pretext for discrimination. Id. Although Santos had the initial burden of proving a prima facie case of discrimination by a preponderance of the evidence, this is irrelevant to our review because the district court went on to consider the second determination of whether the Postal Service articulated nondiscriminatory reasons for not hiring Santos. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711,715 (1983). Thus, we review the district court's conclusion that the evidence established that Santos' non-selection was based on her prior insubordination and Godinez's belief that Santos was not a "team player." these findings were based on Godinez's views of the events surrounding the return of postal funds and records See page two, supra. These findings are reviewed for clear error. Norris v. City and County of San Francisco, 900 F.2d 1326, 1329 (9th Cir. 1990).

Santos argues the court's conclusion that the Postal Service did not retaliate against her is fatally inconsistent with its finding that insubordination was not a reason for Santos' dismissal from the temporary position. The Postal Service argues the findings are not inconsistent because they involved different determinations and were based on the testimony of two different individuals, Montoya and Godinez. The Service contends the court may find Godinez's testimony credible concerning the permanent position even though it did not find Montoya's testimony credible concerning the temporary position. We agree. The court evaluated the credibility of the witnesses and evidence presented, and it concluded that there was not a causal connection between her non-selection and the fact that she had previously filed an EEOC complaint. We find no basis in the record for concluding the district court's findings are clearly erroneous. Norris, 900 F.2d at 1329.

III. CONCLUSION

We AFFIRM the district court.

TRANSCRIBED ORAL ARGUMENT BEFORE U.S. COURT OF APPEALS NINTH CIRCUIT

92-55211 SANTOS V. FRANK

7-12-93, COURT ROOM 2, 1:30 P.M.
Pasadena, CA.
PANEL: GIBSON, HALL, KLEINFELD
PLAINTIFF'S ATTORNEY; DAVID FRANK
DEFENDANT; ASS'T U.S. ATTORNEY, DONNA EVERETT

CASE CALLED,

1. DAVID FRANK; May it please the Court, good after noon I'm David Frank and it's my privilege and honor to represent Mrs. Rachael Santos in this matter, if the Court please. We have before us what we think is a clear example of inconsistency in the holding of the District Court, as to its findings of fact and conclusions of law.

2. JUDGE HALL: Let me interrupt you right at the beginning, with just one comment. It seems to me that the question we have before is a question of fact and it turns to credibility, I admit there seems to be in inconsistency, will you please deal with the problem for me.

3. DAVID FRANK: Yes, your Honor, I'll try to do that. I believe the Court's standard of review as to questions of fact is clearly erroneous standard and the standard for questions of law would be de novo. So, when counsel says, we are asking this Court to re weight the evidence that is true to the extent that we ask the Court to determine whether or not in

fact the finding as to the latter act of the two here. The finding of the District Court can really be in law as it was stated to be considering what Judge Hatter found in the 1982 incident, what I mean is we have a case where the District Court said these superiors, Mr. Godinez, Mr. Montoya were not truthful. They were inconsistent in their affidavit's they were pre textual, their findings of, that this delayed accounting was made such a thing of and that was the reason she was removed from the temporary position, was a pretext. If that was Judge Hatter's finding and we think it is a correct one. In the second half of the case, how can the Court find as a matter of law that, that very same pretext and those very same men know became honest and justified in putting the same rationale to deny Ms. Santos the permanent position.

4. JUDGE KLEINFELD: Counsel, it appears to me, that the District Judge thought that Santos employers were lying about the temporary position but not the permanent position and it appears that the District Judge drew a distinction between Godinez, whom he didn't believe and Montona whom he did, now why is that adequate to sustain determinations under clearly erroneous standard?

5. DAVID FRANK: Well, I think first of all, I believe the record will show your Honor, that the two men filed inconsistent statements. Mr. Godinez retracted his and said no, it is true we didn't really fire her she sorted left of her

own accord, which was absurd under these circumstances. Considering she's suing them and it was, I believe, the record will show that it was Mr. Godinez in fact who called the shots here and it was he who fired my client or prevented her from taking the, removed her from the temporary position and prevented her from taking the permanent position. We have a situation, where the Court, then they say she is not a team player.

6. JUDGE KLEINFELD: Can you believe these people on something and not others, and its often the case in a jury trial that the jury believe something's a witness says and not all the things the witness says?

7. DAVID FRANK: Yes, your Honor, that is very true, expect here we have the same men putting fort the same argument that he found a pretext as to the 1982 removal from the temporary position. Using it to justify the non-granting of the permanent position, it seems beyond belief that he didn't go all the way and didn't find it dishonest.

8. JUDGE KLEINFELD: I'm looking at the findings and your going to have to help me on this. When I look at them, the Judge says that in seven, "that the reason for terminating the employee in the temporary was that she failed to perform the temporary position in an acceptable manner, but that was a lie, because she received high praise for the way she performed it. Then on the permanent position, at finding twelve, the Judge says that he believed Godinez when

Godinez testified that the employee wasn't a team player and couldn't be trusted and had been insubordinate to Montoya , the insubordination and team player reason don't seem to be in the temporary promotion part, so it looks as though the judge just believed the team player and insubordination reasons for the permanent position, but didn't believe the unsatisfactory performance reasons for the temporary position. Show me what I'm missing here, just show me the words or paragraphs.

9. DAVID FRANK; Well, what I think you stated accurately your Honor, as to what was found here, but if I may, I can analogize this to a manager or couch taking a player off a team, off the field, who has never had a reprimand, never a punishment, never a warning, putting her on the bench, she then complains and say's I want to stay on the team and they say "shut up, your not a team player, now your complaining when the complaint is, I want to be there where I belong, and to then use that, as a justification for preventing her promotion, is an irony that would be amusing, if it didn't destroy her career.

10. JUDGE KLEINFELD: Well, there is a bit of a difference between the temporary position, where apparently the concern was whether she conducted the seminar in an appropriate way, had failed o show up for parts of it, failed to introduce people properly and stirred up too much criticism and in the permanent part, where the criticism was,

she had gotten all this money in for the services and she wouldn't give the Post Office, her boss at the Post Office the records.

11. DAVID FRANK: Right , and that was a bogus reason because, the accounting was very ,very through. Mrs. Santos had been in an office known at the Post Office as the Revenue Protection and Mail Classification section.

12. JUDGE KLEINFELD: Sure, she didn't steal any of it as it turns out and the accounting was O.K., but when her boss asks for the records, she didn't give them to him isn't that right?

13. DAVID FRANK: All she said was give me a receipt, that's all she wanted, was proof, these were non-postal funds, she was responsible for them and she simply asked Mr. Godinez or Montoya at that point, let me have a receipt.

14. JUDGE KLEINFELD: I thought there was a long delay between the demand.

15. DAVID FRANK: It was about a week and he latter said a week latter. He said it was insignificant, he himself and at they EEOC hearing they said it was proper and it was passed by as a really insignificant thing and she accounted, a very, I believe it's Exhibit 116, its in the file, in fact I have copies here and I have given them to counsel, if the Court would like to see it. It is also in the file Exhibit 116, of a very very thorough accounting that Ms. Santos did. Yes, she said, her it is, it was dated October 12, it was timely done. She

merely said, let me have a receipt, now if that was insubordination and that's not a team player. I think it's stretching a point when you have someone here since the 60's, this is an employee for decades, this is her life's career.

16. JUDGE KLEINFELD: The receipts not the problem, the delay is the problem.

17. DAVID FRANK: Well, she had it ready to give them it was just, I will give it to you when you give me a receipt, is what she said. And that was at the trial and they didn't want to do that and they felt who are you to tell us whether we need a receipt or not or whether you need a receipt, give it to us when we ask for it and the fact that she was cautious. And its interesting to note Ms. Steinem's never been paid to this date, there is money missing and unaccounted for and the six or seven hundred dollars that was left over. It was not properly accounted for and she was right in being cautious and I guess the question comes down to whether Judge Hatter can say that, asking for a receipt was insubordination and was justification and not a pretext as he found it to be in the 82 incident. But now in 84 when the position comes up, he says, Yeah, I guess I'll buy that, and I find that inconsistent with his finding them to be untruthful men and to finding them to put this whole thing as he called it a pretext in 82.

18. JUDGE KLEINFELD: You have this model, either your a truthful man or untruthful man, there's no such thing as the person who's truthful about money, but lies a little about his golf score.

19. DAVID FRANK: No, you can be inconsistent your Honor, certainly, but here we have the same bogus pretext put up, its the same act that their using again. It seems to me a stretch in logic, to considered it valid now considering the facts of this. Considering the kind of employee we have here, that now its valid and it wasn't then, it just seems to me. I think its inconsistent in other words, the case I cited Freightways case, says that if an irreconcilable conflict exists between ultimate findings of material facts, a judgment based upon such findings, can not stand. And I think that when you have two men, one basically using the same argument that's rejected as untruthful the first time, but now it's suppose to stand the test of validity and honesty. On the second instance, the only thing that happened is they got sued by Rachael Santos and they go sued twice, taken before the EEOC, that's what its all about, because when Ms. Steinem spoke and said a few comments that caused Washington to call the Postal Department, they said to themselves, our feathers are ruffled, who is she to cause these waves, I think we better get rid of her its a little to zealous in her duties about women's rights. A little

to zealous in her calling. We don't need someone to make these waves and all they were doing was
checking on things that blew over, but they didn't like it and I think they acted bureaucrats and I think they wanted her removed and in doing so they killed her career of a quarter of a century.

20. JUDGE HALL: All right, your time is up.

21. DAVID FRANK: Al right, thank you very much.

22. JUDGE HALL: Will hear from the other side, please.

23. DONNA EVERETT: May it please the court. I'am Donna Everett, Assistant U.S. Attorney and I represent the Appellant, the Postmaster General. The only substitutive issue in this appeal is whether or not the District Court clearly errored in finding that Hector Godinez lacked discriminatory intent in not recommending the plaintiff for the permanent position of Women's program coordinator 1984. if the district courts finding is plausible in light of the record reviewed in its entirety, it is not reversible even if the appellate court would have weighed the evidence differently.

24. JUDGE KLEINFELD: Will you tell us what the basis was for the fining that she had been insubordinate, wasn't a team player and couldn't be trusted.

25. DONNA EVERETT: Does, is the court referring to what testimony was provided to with regard to that issue, well.

26. JUDGE KLEINFELD: Testimony or other evidence, could have been exhibits, I don't know what is was?
27. DONNA EVERETT: Well, the Court specially found that Hector Godinez credibly testified with regards to his reason for not recommending the plaintiff for the permanent promotion and that was that her prior insubordination to Arthur Montoya was unacceptable and it demonstrated that the plaintiff was not a team player and that she would not bode well in an administration position. His testimony was consistent with that of Arthur Montoya, who also testified that the plaintiff delayed well over a month in returning the records. Um, Um, she demanded that she get a receipt for the records which was dated after October 22, this seminar with Gloria Steinem was September 10th and 11th. So the was demonstrative evidence that plaintiff delayed well over a month in returning the funds and the records. Also Mary Engelbrecht collaborated the testimony of Mr. Godinez and Mr. Montoya, she testified that she was present on many occasion when Mr. Montoya and the plaintiff became involved in verbally disputes over whether or not plaintiff would return the records. In fact Ms. Engelbrecht pointed out to the Court, that the plaintiff at one point demanded that the Postal Service purchase a computer for the Women's Program or she would not turn over the funds. She also demanded, um, that her record be expunged, or she wanted

a promise that her delay in turning in the funds wouldn't effect her career, which the Postal Service wouldn't do. Also Ms. Engelbrecht testified that the plaintiff, when she first turned over the funds, she wouldn't sign the check any the check was returned by the bank which was further delay in having the accounting and receiving the funds by the Postal Service.

28. JUDGE KLEINFELD: So your saying she held the money hostage for the things she wanted for the Women's Program and other things.

29. DONNA EVERETT: Yes, that's correct your Honor, additional the plaintiff's testimony herself indicated that she didn't hand over the funds and the records in a timely manner. That's on page 109 in the transcript. The plaintiff's own witness, Adolf Alexander, testified that it took along time to get an understanding with regard to the plaintiff turning the records to Mr. Montoya. Mr. Alexander testified that the plaintiff brought him in as a sort of a liaison between Mr. Montoya and the plaintiff. And between the three of them someone came up with the idea of getting a receipt for the return of the funds. Additionally in the record there is the receipt which verifies that the funds were returned after October 22nd, that's exhibit 115, defendant's exhibit 115. Basically the record reflected that Mr. Godinez was favorably impressed with Patty Herrera, the person ultimately recommended by Mr.Godinez for the position.

He indicated that Ms. Herrera's performance on a temporary basis in that very position demonstrated that she had a good imagination and that she had solid administrative abilities, which the plaintiff demonstrated that she did not have. Hector Godinez believed that the plaintiff had no ability to led or to motivate, based on his observation of her in the temporary position in 1982. As far as the record show there is absolutely no testimony provided by the plaintiff or no evidence to refute the findings of the Court that Mr. Godinez's reason for not recommending the plaintiff, was her prior insubordination and in summary.

30. JUDGE GIBSON: Well, are you contending then that the other persons or one of the other persons considered was more qualified then the plaintiff in this case for the position?

31. DONNA EVERETT: Well, no your Honor.

32. JUDGE GIBSON: Regardless what happened, that a more qualified person was appointed to the position.

33. DONNA EVERETT: No, your Honor, actually the issue of whether or not the person recommended for the position was better qualified doesn't go to the issue with regard to the retaliation claim, the sole determination to be made by this court is whether or not.

34. JUDGE GIBSON: Why wouldn't it go to retaliation claim if the other person, was, or they should select the most qualified for the position.

35. DONNA EVERETT: They should your Honor, however this court is not to, to replace the District Court, to replace the agency's determinations of personnel matters with it's own, the sole.

36. JUDGE GIBSON: In other words your admitting that she was not considered for the position because of her prior actions of insubordination.

37. DONNA EVERETT: No your Honor, what I'm saying is that Mr. Godinez considered the plaintiffs application along with everyone else's and based upon his personnel knowledge of seeing her in the position felt that she did no have any of the qualifications necessary for an administrative position.

38. JUDGE GIBSON: Well she wasn't as qualified as the others then?

39. DONNA EVERETT: She wasn't as qualified as Ms. Herrera.

40. JUDGE GIBSON: From his personal point,

41. DONNA EVERETT: Yes, your Honor.

42. JUDGE KLEINFELD: If you don't regard holding money hostage as bearing on qualifications somebody can be extremely intelligent and energetic but you can't trust them to give them your money.

43. DONNA EVERETT: That's correct.

44. JUDGE KLEINFELD: Then there not qualified.

45. DONNA EVERETT: That's correct, Mr. Godinez also pointed out in his testimony that he received many complaints who worked with the plaintiff, that she was not able to lead or motivate people or to get along with people, which Mr. Godinez considered an important factor in determining who should be selected for that position. As I said this was an administrative position not an operations position, which Mr. Godinez considered to be less people oriented, so the plaintiff inability to perform those functions was crucial in determining whether or not should be recommended for the position.

46. JUDGE HALL: No further questions? (panel) all right, thank you. very much.

47. DONNA EVERETT: Thank you.

48. JUDGE HALL: Mr., Frank, you have used up your time, but well give you a minute for a quick response.

49. DAVID FRANK: I'd just like to ask the court to note pages 98 and 102 of the excerpts of record, comparing Mrs. Santos application and her qualifications with Patty Herrera, you have.

50. JUDGE KLEINFELD: Isn't true counsel that we don't make personnel decisions. All we do is reject personnel determinations that were made for illegitimate reasons?

51. DAVID FRANK: Yes, but I think considering the contrast your Honor, here between Mrs., Santos 25 years of qualifications, college graduate, extra courses towards a

masters degree, with a non-high school graduate, a level 5, in comparison to a level 15.

52. JUDGE KLEINFELD: Would you hire a, would you think that, that you should hire a lawyer who is law review at Harvard, brilliant, energetic, never misses a deadline, but it's hard to get the money and the accountings from his trust fund to the client?

53. DAVID FRANK: Your Honor that simply didn't happen the way it's been presented it simply didn't happen that way. The money was, they knew where it was its no big secret.

54. JUDGE KLEINFELD: Yeah, but they didn't have it, they couldn't get it.

55. DAVID FRANK: she went to them, with the checkbook and the accounting saying here it is just please give me a receipt. I guess that's the issue.

56. JUDGE KLEINFELD: What's the story on the computer, did she say I'll give you the money if you give us a computer for the Women's program?

57. DAVID FRANK: I don't know what the court's referring to in that regard.

58. JUDGE KLEINFELD: Counsel for the government just described that and she said, when asked for the money, that she wanted them to buy a computer for the women's program or she wouldn't turn over the money.

59. DAVID FRANK: No, that's not part of the record that I am aware of, I just don't know about that, but I don't believe I saw that in any part of the record at all, and, but if you, I think considering the contrast between these two ladies as to who got the job, I think that the court may consider that as to the facts and circumstances of whether there was retaliation here and, um, you have someone who , also there is a rule, that they broke to put her in the job, when a worker is put in a temporary position and she's there as long as Ms. Herrera was, she's not suppose to get the permanent position, don't ask me why they have that rule, but they did and they said they got a wavier in this instance, which was not done, the record doesn't show any evidence.

60. JUDGE HALL: Your getting off the course for rebuttal counsel.

61. DAVID FRANK: Pardon me.

62. JUDGE HALL: Your time is up

63. DAVID FRANK: Thank you, very kindly

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Filed February 3, 1992

RACHAEL V. SANTOS
Plaintiff,

CV 89-6123 TJH
ORDER

v.

ANTHONY M. FRANK
Defendant.

The Court, having considered the motion for new trial, motion to correct clerical errors, and motion for extension of time, together with the moving and opposing papers,

It is Ordered that the motion for new trial be, and hereby is, ***Denied.***

It is Ordered that the motion for extension of time be, and hereby is, ***Denied.***

It is Ordered that the Court's Findings of Facts and Conclusions of Law be corrected as follows:

The trial dates in the action were October 7 and 17, 1991; and Page 11, line 13 is changed to read "1984", not "1982".

Date: January 31, 1992

Terry J. Hatter, Jr.
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

[FILED DEC-9 1991]

RACHAEL V. SANTOS

Plaintiff,

v.

ANTHONY M. FRANK, etc.,

Defendant,

CV 89-6123
TJH(JRx)

Findings of Fact
and
Conclusions of Law

The above-entitled case came on regularly for trial on September 16, 1991, at 10:00 a.m., plaintiff being represented by James Oliver Foster; defendant being represented by Donna J. Everett, Assistant United States Attorney, and Janelle Sherlock, United States Postal Service. The Court, having considered all pleadings and papers on file herein and the oral and documentary evidence offered and received at that time of trial and being fully advised hereby makes the following findings of fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff was and is now, at all times herein mentioned, an employee of the United States Postal Service (Defendant").

2. Prior to June, 1982, plaintiff was a Level-15, Supervisor of Mails on the day shift at the Alhambra Mail Processing Center.

3. In June, 1982, plaintiff was selected for a temporary promotion by defendant, not to exceed two years as the Sequoia District Women's Program Coordinator ("Women's Coordinator") a level-17 position.

4. As Women's Coordinator plaintiff's duties were to assist in developing activities and programs relating to the employment status of women and to provide information on career opportunities and development of action plans for the recruitment and advancement of women in the service of defendant.

5. As part of her duties, plaintiff planned and conducted a women's seminar, featuring Gloria Steinem as a speaker, on September 10 and 11, 1982, to provide information to women employees with respect to career development.

6. On or about September 11, 1982, plaintiff received a Certificate of Appreciation for her participation in the Women's Seminar and was informed by the Postmaster of

Beverly Hills that the Women's Seminar was "a smashing success".

7. Subsequently , plaintiff was informed by at the headquarters of defendant that there was a concern whether Steinem's speech at the seminar would have as adverse impact on the reputation of defendant.

8. On or about September 16, 1982, defendant was informed that Lettie Critchfield, the person who previously held the Women's Coordinator's position would be returning to her old position.

9. Prior to September 20, 1982, defendant was informed by Critchfield that she would be taking sick leave for surgery and did not know when she could return to her former position as Women's Coordinator.

10. Defendant did not tell plaintiff that her position as Women's Coordinator would be terminated because of the anticipated return of Critcfield, nor did it inform her that the return of Critchfield to her position would be delayed because of surgery.

11. During the week of September 20-24, 1982, plaintiff attended an out-of-town management training seminar and when she returned, she saw one Mary Englebrecht sitting at her desk and performing her duties.

12. On or about September 27, 1982, plaintiff attended a seminar with postal supervisors Arthur Montoya and Hector Godinez and was criticized for her participation in the

Women's Seminar and for a TV appearance on the Spanish speaking network with respect to women's rights.

13. On October 1, 1982, the Manager at Alhambra, Reggie Martin, informed plaintiff that she was to export to Alhambra on October 3, 1982. According to plaintiff, this was the first notification of her termination from the Women's Coordination position.

14. When plaintiff reported to Alhambra, she was given a Level 15 position as Supervisor of Mails but on the night shift instead of day shift where she previously held the position.

15. Critchfield never returned to the position of Women's Coordinator of the Sequoia District.

16. On or about December 15, 1982, plaintiff filed a formal complaint of discrimination alleging reprisal in that Montoya and Godinez had retaliated against her by harassing her and removing her from her temporary promotion to the Women's Coordinator position because she coordinated and sponsored the Women's Seminar and appeared on TV providing information on employment rights.

17. In the course of investigating plaintiff's complaint affidavits were submitted by Montoya and Godinez.

18. In an affidavit dated July 20, 1984, Godinez testified that plaintiff's position as Women's Coordinator was terminated due to her failure to perform the functions of the position in a professional and acceptable manner.

19. In an affidavit dated July 20, 1984, Montoya testified that plaintiff's position as Women's Coordinator was terminated by the mutual consent of plaintiff and Montoya after she learned Critchfield was coming back.

20. In an affidavit dated January 25, 1985, Godinez retracted some of the statements in his July, 1984 affidavit and testified that after reviewing Montoya's affidavit plaintiff was not removed from her position; it was terminated as result of a personnel action.

21. On or about June 23, 1983, Plaintiff received a letter from Godinez, signed by Montoya expressing their gratitude for her dedication and hard work for coordinating and sponsoring the Women's Seminar.

22. In May of 1984, a vacancy announcement for the position of Sequoia District Women's Program Coordinator was posted; the position was open and was to be filled on a permanent basis. The plaintiff submitted an application for the position, on PS Form 991, Application for Promotion or Assignment("991"), along with ten other applicants. The board members were Arthur O. Martinez, Gloria Nelson, and Eileen Lewis. The board's function was to select the four best qualified applicants for the position and to submit these names to Hector Godinez, the official who would select one applicant from among the four for

final approval for the position by Joseph Caraveo, Regional Postmaster General.

23. The promotion board chose the plaintiff and three other applicants as the four best-qualified applicants for the position. Hector Godinez did not select recommend the plaintiff for the position. Godinez reasoned that although the plaintiff was qualified in some areas such as past experience and technical training, she was not well-qualified in other areas for the job. Specifically, the plaintiff had been insubordinate when she refused to return the Women's Program files to Arthur Montoya in October, 1982. Because of such insubordination, Godinez believed that the plaintiff would not function well as a "team player' and could not be trusted in the position of Women's Coordinator.

24. When plaintiff was not selected for the permanent position of Women's Coordinator, she filed a request for EEO counseling on or about August 10, 1984. She alleged that she was the best qualified for the position of Women's Coordinator and by not selecting her, Hector had retaliated against her for naming him as an alleged discriminating official in her previous EEO complaint, Plaintiff filed a formal complaint of discrimination on or about September 20, 1984.

25. Any conclusion of law which may be deemed a finding of fact is hereby deemed incorporated.

CONCLUSIONS OF LAW

The forgoing decision is based upon the following, legal rationales:

1. Evaluation of evidence in a case of alleged discriminatory treatment generally involves a three-step process as delineated by the Supreme Court in the landmark case of McDonnel Douglas Corp. v. Green, 411 U.S. 792 (1973) and other landmark cases expounding on the analytical principals of that case. U.S. Postal Service v. Aikens, 460 U.S. 711 (1983). Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Teamsters v. U.S., 431 U.S. 324 (1977).

2. Plaintiff has the initial burden to prove, by a preponderance of the evidence, a prima facie case of discrimination. If plaintiff meets this burden, defendant has the burden of production to clearly articulate a legitimate, nondiscriminatory reason for its actions. If defendant meets the burden, plaintiff must then prove by a preponderance of the evidence that defendant's articulated reasons are a pretext for discriminatory motive. Plaintiff may establish pretext by either proving that a discriminatory reason more likely motivated defendant or that defendant's articulated reasons for its actions are unworthy of belief. Burdine, supra, 450 U.S. at 254-56.

3. The regulations implementing Title VII as applied to federal sector employment, 42 U.S.C. §2000e-16, are 29 C.F.R. §1613.201, et seq. 29 C.F.R. §1613.261 provides that it is unlawful to discriminate against a person because he or she filed a charge of discrimination or because of any opposition to an unlawful employment practice.

4. To establish a prima facie case of reprisal/retaliation in violation of Title VII, plaintiff must prove that: (1) she engaged in activity protected by Title VII which was known to defendant, (2) the defendant made an adverse employment decision; and (3) a causal connection existed between the protected activity and the adverse employment action. Johnston v. Horne, 875 F.2d 1415, 1421 (9th Cir. 1989); Yartzoff v. Thomas, 8-9 F.2d 1371, 1375 (9th Cir.1987). The causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action. Burrus v. United Telephone Co., 683 F.2d 339, 343 (10th Cir. 1982) cert denied, 459 U.S. 1071 (1982). It also must be shown that defendant had actual or imputed knowledge of the opposition or participation. Rogers v. McCall, 488 F. Supp 689, 697-98.

5. On the 1982 temporary promotion issue, the Court finds that plaintiff has established a prima facie case in that she proved she was engaging in protected activity as defined

by 29 C.F.R. §1613.261 AND §704 (a) of Title VII when she was instrumental in putting on a seminar promoting Equal Employment Opportunity within the Postal Service and appearing on TV to inform the Spanish speaking public of employment rights; defendant was aware of her participation in such protected conduct in that she received criticism from defendant, was terminated from her temporary position two weeks after participating in the protected conduct by defendant, and that the protected conduct was so closely followed by the treatment that an inference of a retaliatory motive is justified.

6. Defendant articulated a nondiscriminatory response for the termination of plaintiff's temporary promotion: she failed to perform the function of the position in a professional, satisfactory and acceptable manner and/or Critchfield was returning to the position.

7. Defendant's reason for terminating plaintiff's position as articulated by Godinez in his July 20, 1984 affidavit that plaintiff failed to perform the functions of the position in an acceptable manner is contradicted by the evidence wherein she received high praise for implementing the women's seminar for defendant. The allegations that plaintiff disregarded authority or was insubordinate because she failed to give her supervisor a financial accounting of the seminar in a timely manner were made after plaintiff was terminated from the position. Therefore, the Court finds that

this reason was not a legitimate nondiscriminatory reason for plaintiff's termination as indicated by Godinez's January 25, 1985 affidavit which repudiated his July 20, 1984 affidavit.

8. Defendant articulated a legitimate nondiscriminatory reason for terminating plaintiff's position indicating that Critchfield was returning to her old position. However, the Court finds that the reason was a pretext for reprisal for the following reason:

(a) The inconsistency in testimony between Godinez and Montoya makes defendants reasons unworthy of belief;

(b) Criticism against plaintiff by the affidavits of Godinez and Montoya were made after plaintiff's position was terminated indicating it was more likely that discriminatory reasons motivated defendant; and

(c) defendant was aware that Critchfield was not returning to her position due to surgery before plaintiff was terminated from her position indicating it was more likely that discriminatory reasons motivated defendant.

Accordingly, the Court finds that plaintiff has shown by a preponderance of the evidence that defendant retaliated against plaintiff in violation of Title VII when defendant terminated plaintiff;s temporary promotion to Women's Coordinator in September, 1982.

9. Judgment is awarded to plaintiff with respect to the termination of her temporary position.

10. Plaintiff is entitled to back pay with interest at the legal rate which would be the difference between her Level-15 pay and the Level -17 pay she should have received from October 1982 to October 1984, after her position was terminated.

11. The evidentiary burdens for the plaintiff;s second claim of reprisal discrimination are the same as those set forth, supra, in the preceding section of this memorandum.

12. Prior to 1984, the plaintiff filed an EEO complaint of which Mr. Godinez was aware. Mr. Godinez had been named as one of the alleged discriminating officials. Mr. Godinez credibly testified that his reasons for not selecting the plaintiff for Women's Coordinator in July 1984 were her prior insubordination to Mr. Montoya, and his belief that such insubordinate behavior was unacceptable. Mr. Godinez considered the plaintiff was not a "team player" and could not be trusted in the position based on her prior behavior regarding the files.

13. Whether defendant's position is characterized as the belief that the plaintiff was not qualified for the position, or an articulation of nondiscriminatory reasons in response to plaintiff's prima facie case is largely irrelevant. The critical issue is the defendant's motive for its action. In the end, the plaintiff must prove by a preponderance of the evidence a causal connection between her non-selection for the position

of Women's Coordinator and the fact that she had previously filed an EEO complaint. See U.S. Postal Service v. Aikens, 460 U.S. 711, 715 (1983). '{P]roof of discriminatory motive on the part of [the Postal Service] is essential to [the plaintiff's] action." Douglas v. Anderson, 656 F.2d 528, 531 (9th Cir. 1981). Plaintiff cannot meet this burden. In fact, the evidence established that plaintiff's non-selection was based on her prior insubordination.

14. After consideration of all the evidence, the Court finds that plaintiff has not proved by a preponderance of the evidence that the defendant retaliated against the plaintiff in violation of Title VII when the plaintiff was not selected the position of women's Coordinator in July 1982.

15. Plaintiff is further entitled to her costs and reasonable attorney's fees for prosecuting this action.

16. To the extent that any of these conclusions of law are deemed findings of fact, they are incorporated as findings of fact.

Date: December 4, 1991

TERRY J. HATTER, JR.
UNITED STATES DISTRICT JUDGE